

STATE OF MICHIGAN
COURT OF APPEALS

CHARLES CONTINERI II,

Plaintiff-Appellee,

v

JON H. W. CLARK,

Defendant-Appellant.

UNPUBLISHED

July 31, 2003

No. 237739

Wayne Circuit Court

LC No. 01-104676-CK

Before: Cavanagh, P.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from a renewed judgment for plaintiff in the amount of \$344,915.12. We affirm.

I. Facts and Procedure

In 1990, plaintiff filed a complaint against defendant, who was representing plaintiff as his attorney, alleging that defendant had misappropriated funds he had received in the course of representing plaintiff's interests in regard to the estate of plaintiff's uncle. On March 4, 1991, the trial court entered a default judgment in favor of plaintiff in the amount of \$204,718.44. In 1992, defendant filed for bankruptcy in federal bankruptcy court. The bankruptcy court ordered that defendant's debt to plaintiff was procured by fraud and was not discharged. *In re Clark*, unpublished order of the United States Bankruptcy Court for the Eastern District of Michigan, entered December 11, 1992 (Docket No. 92-09100-G). On February 9, 2001, plaintiff filed the instant action to renew the original judgment pursuant to MCL 600.2903 and MCL 600.5809(3). On April 26, 2001, defendant filed an answer and affirmative defenses, alleging that the judgment was satisfied, released, or discharged. Defendant also counterclaimed, making numerous allegations of illegal fraudulent conduct on the part of plaintiff. The trial court granted plaintiff's motion for summary disposition of defendant's counterclaims, concluding that defendant could not challenge the original judgment by counterclaim, but had to do so by motion for relief from judgment. On September 20, 2001, defendant moved to set aside the original default judgment. On October 12, 2001, the trial court denied defendant's motion, determining that the motion was untimely and that defendant should have timely appealed the original judgment. The trial court also ruled that interest on the original judgment should be computed using the higher state interest rate, as opposed to the federal interest rate. On October 19, 2001, the trial court entered an order renewing the judgment for plaintiff in the amount of \$344,915.12. On November 7, 2001, defendant filed the claim of appeal in the present case, appealing the

October 19, 2001, renewed judgment. On December 26, 2001, defendant filed a delayed application for leave to appeal the trial court's October 12, 2001, order denying his motion to set aside the default judgment in Docket No. 238601. With limited exceptions addressed later in this opinion, the issues defendant raised in his delayed application for leave to appeal in Docket No. 238601 were essentially the same as the issues defendant raises in the present case. This Court denied defendant's delayed application for leave to appeal "for lack of merit in the grounds presented."¹ *Contineri v Clark*, unpublished order of the Court of Appeals, entered February 14, 2002 (Docket No. 238601).²

II. Law of the Case

On appeal, defendant essentially makes the following arguments: (1) the trial court erred in disallowing defendant from asserting any affirmative defenses in this case, such as satisfaction, release, or discharge; (2) the trial court erred in granting plaintiff's motion for summary disposition of defendant's counterclaims where defendant was mentally incompetent at the time the original default judgment was entered; (3) defendant's due process rights were violated by improper service; and (4) the trial court erred in applying the state interest rate, as opposed to the federal interest rate, to the original judgment amount in determining the amount of the renewal judgment. We conclude that the law of the case doctrine precludes this Court from reconsidering the first three of these issues on appeal.³

¹ Because defendant raised some of the same issues in his delayed application for leave to appeal in Docket No. 238601 as he had already raised in his claim of appeal in the present appeal, this Court could have consolidated the two appeals or denied defendant's delayed application for leave to appeal in Docket No. 238601 because the issues raised in the application were going to eventually be addressed or could have been raised in the present appeal. Instead, this Court chose to deny defendant's delayed application for leave to appeal for lack of merit. Defendant made the choice to raise these issues in both this appeal as of right and his delayed application for leave to appeal in Docket No. 238601. By doing so, defendant risked the possibility that this Court might address the issues he raised in his application and deny his application on the merits before issuing an opinion in regard to his appeal as of right in the present case.

² The Supreme Court also denied defendant's application for leave to appeal in this case. *Contineri v Clark*, 467 Mich 892; 653 NW2d 407 (2002).

³ Plaintiff argues that defendant's appeal should be dismissed on the basis of collateral estoppel and res judicata. However, "[c]ollateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding." *Barrow v Pritchard*, 235 Mich App 478, 480; 597 NW2d 853 (1999), quoting *Porter v Royal Oak*, 214 Mich App 478, 485; 542 NW2d 905 (1995). "Res judicata serves to bar any subsequent action where the first action was decided on its merits, the second action was or could have been resolved in the first action, and both actions involve the same parties or their privies." *Solution Source, Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368, 376; 652 NW2d 474 (2002). This appeal does not involve two separate actions, but involves a two separate *appeals* involving the same suit. Therefore, this appeal involves application of the law of the case doctrine.

The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue. Thus, a question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case. The primary purpose of the doctrine is to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit. [*Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 91; 662 NW2d 387 (2003), quoting *Ashker v Ford Motor Co (After Remand)*, 245 Mich App 9, 13; 627 NW2d 1 (2001).]

The law of the case only applies to issues actually decided, either implicitly or explicitly, in the prior appeal. *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). Generally, orders denying leave to appeal are considered acts of judicial discretion and do not express an opinion on the merits of the case. *Great Lakes Reality Corp v Peters*, 336 Mich 325, 328-329; 57 NW2d 901 (1953); *Malooly v York Heating & Ventilating Corp*, 270 Mich 247; 258 NW 622 (1935), app dis 296 US 533; 56 S Ct 92; 80 L Ed 379 (1935); *West Michigan Park Ass'n, Inc v Fogg*, 158 Mich App 160, 166; 404 NW2d 644 (1987). In the present case, however, this Court did not deny leave to appeal without considering the merits of the case, but expressly articulated that it was denying leave “for lack of merit in the grounds presented.” *Contineri, supra*. Despite case law holding that orders denying leave to appeal do not express an opinion on the merits of the case, Michigan courts have not held that this case law applies to orders denying leave to appeal “for lack of merit.” See *People v Hayden*, 125 Mich App 650, 662-663; 337 NW2d 258 (1983) (M.J. Kelly, P.J., concurring). Recently, in fact, our Supreme Court concluded that the law of the case doctrine did not apply where, “[i]n denying the [appellant’s] application for leave to appeal in the case, we expressed no opinion on the merits.” *Lopatin, supra* at 260 (emphasis added). In contrast to the order denying the appellant’s application for leave to appeal in *Lopatin*, the order denying defendant’s application for leave to appeal in the present case *did*, in fact, express a decision on the merits. See *Hayden, supra* at 663 (M.J. Kelly, P.J., concurring). Therefore, we conclude that the law of the case doctrine applies to the issues this Court decided in denying defendant’s application for leave to appeal in Docket No. 238601. In defendant’s application, he raised essentially the same arguments as he raises in the present appeal, with the exception of the interest rate argument.⁴ Because this Court

⁴ On appeal, defendant argues that the trial court erred in disallowing him from bringing a counterclaim to attack the validity of the renewal judgment. We recognize that defendant did not raise this issue in his application for leave to appeal in Docket No. 238601. However, even if the trial court erred in determining that defendant could not bring a counterclaim against plaintiff’s complaint to renew the judgment, this Court addressed the substantive merits of defendant’s arguments attacking the validity of the renewal judgment in denying defendant’s application for leave to appeal in Docket No. 238601. In the present appeal, defendant does not appeal the trial court’s order granting summary disposition of his counterclaims, but appeals the October 19, 2001, renewal judgment for plaintiff. This court determined that defendant’s arguments attacking the validity of the renewal judgment lacked merit. Therefore, the law of the case doctrine applies to this issue, despite the fact that these arguments may have been included in defendant’s counterclaim.

decided these issues on the merits in denying defendant's application for leave to appeal, we are bound by this Court's decision and are precluded from reconsidering the issues raised by defendant.

III. Interest Rate

In the remaining issue, defendant argues that the trial court erred in applying the state interest rate to the judgment because defendant's debt was governed by federal bankruptcy law.⁵ We disagree. The determination of which statutory interest rate to apply is a question of law that is reviewed de novo. *Yaldo v North Pointe Ins Co*, 217 Mich App 617; 552 NW2d 657 (1996), aff'd 457 Mich 341 (1998). In support of his argument, defendant cites *In re Brace*, 131 BR 612 (WD Mich, 1991). In *In re Brace, supra* at 614, the bankruptcy court stated, "If this had been a diversity case, or one grounded on state law, the Michigan interest rate statute would have to be used in the consideration of prejudgment interest." In the present case, the original default judgment was grounded in state law. Therefore, the state interest rate applies in this case.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Brian K. Zahra
/s/ Pat M. Donofrio

⁵ This issue is not barred by the law of the case because it was not raised by defendant in his application for leave to appeal in Docket No. 238601.